

ORDER OF COMMISSIONSECRETARY OF STATE
COMMISSIONS DIVISION

In the matter of Objection No. 005 filed by the St. Louis District Council of Greater St. Louis and Vicinity on April 6, 2012, to Annual Wage Order No. 19, pertaining to the wage rate, total fringe benefit, and overtime schedule for the occupational title of Carpenter in the county of Ozark – Section 077; issued by the Division of Labor Standards, Department of Labor and Industrial Relations, filed with the Secretary of State: March 9, 2012.

I. Introduction

On April 6, 2012, an objection to Annual Wage Order No. 19 was filed on behalf of the St. Louis District Council of Greater St. Louis and Vicinity (Objector), with the Labor and Industrial Relations Commission (Commission). Objector specifically objects to the wage rate, total fringe benefit, and overtime schedule determinations for the occupational title of Carpenter in the county of Ozark – Section 077.

For Carpenters in the county of Ozark – Section 077, Annual Wage Order No. 19 establishes a prevailing wage rate of \$15.50, no fringe benefits, and an overtime schedule of time and one-half (1½) to be paid for all work in excess of forty (40) hours per work week. Objector argues that the correct wage rate, total fringe benefit, and overtime schedules for Carpenters in the county of Ozark – Section 077 should be as follows: \$23.33 wage rate, \$10.12 or \$10.13 total fringe benefit, and an overtime schedule of time and one-half (1½). We note that the overtime schedule Objector requests is the same as the overtime schedule already included in Annual Wage Order No. 19. Therefore, for purposes of this order, we will only address Objector's objections to the wage rate and total fringe benefit for the occupational title of Carpenter in the County of Ozark – Section 077.

On May 15, 2012, pursuant to 8 CSR 20-5.010(3)(A), a prehearing conference was convened on Objection No. 005 for the purpose of aiding in the disposition of the hearing. A prehearing order was prepared pursuant to 8 CSR 20-5.010(3)(B), by the Commission's designated representative and Staff Counsel, Ross Ball.

Pursuant to § 290.262.4 RSMo, all parties were notified of the hearing, which was conducted on June 4, 2012, in Jefferson City, Missouri. Presiding at the hearing were Commissioners, William F. Ringer, James Avery, and Curtis E. Chick, Jr. Staff Counsel, Ross Ball and David Talley, were present as legal advisors to the Commission. Objector and the Division were represented by counsel.

II. Evidence Presented*The Division's Evidence*

The Division offered as evidence the prepared direct testimony of Carla Buschjost, Director of the Missouri Division of Labor Standards, and referenced exhibits. The evidence was admitted without objection.

Ms. Buschjost testified at the hearing as to how the Division arrived at the wage rate, total fringe benefit, and overtime schedule for the occupational title of Carpenter in the county of Ozark – Section 077. Specifically, Ms. Buschjost testified that the wage rate, total fringe benefit, and overtime schedule were established based upon 864 hours of carpentry work submitted by

Winrod Brothers Construction for work completed on a "multi-level motel building" in Ozark County.

Ms. Buschjost further testified that the Division reviewed the hours submitted by Objector and determined that no change is warranted to its determination of the prevailing wage for the occupational title of Carpenter in the county of Ozark – Section 077.

On cross-examination, counsel for Objector questioned Ms. Buschjost regarding the extent to which the Division investigated the truth or falsity of the reported hours by Winrod Brothers Construction. Ms. Buschjost indicated that the Division reviews all of the hours submitted for each county and accepts the hours submitted at face value.

Objector's Evidence

During cross-examination of Ms. Buschjost, counsel for Objector offered two untitled exhibits (Carpenter's Exhibit 1 and Carpenter's Exhibit 2). Carpenter's Exhibit 1 consisted of two handwritten pages, which were offered as evidence of wages paid for carpentry work in Ozark County by Springfield Builders, Inc. Carpenter's Exhibit 2 consisted of a one page worksheet purporting to summarize the information contained in Carpenter's Exhibit 1.¹ Yet, a third set of hours is described in Objector's June 8, 2012, brief filed with the Commission.² Objector's evidence and proposals³ are summarized below.

Source	Hours	Hourly Wage	Fringe Benefit	Total Wage
Exhibit 1	715	\$23.33	\$10.12	\$33.45
	336	23.33	10.13	33.46
Exhibit 1 hours	1051			
Exhibit 2	838	\$23.33	\$10.12	\$33.45
	176	23.33	10.13	33.46
Exhibit 2 hours	1014			
Brief	771	\$23.33	\$10.12	\$33.45
	338	23.33	10.13	33.46
Brief hours	1109			

At the hearing, Ms. Buschjost reviewed Objector's Exhibits 1 and 2 and indicated that the Division establishes the prevailing wage rates based upon wage rates and total fringes paid as

¹ Counsel for Objector did not explain the discrepancies between Carpenter's Exhibit 1 and Carpenter's Exhibit 2, even though Carpenter's Exhibit 2 was offered as a summary of Carpenter's Exhibit 1.

² The Division filed a response to Objector's brief on June 11, 2012.

³ The hours described in Objector's brief are not in evidence. They are discussed here solely to highlight the inconsistencies in Objector's evidence and argument.

a whole package. Ms. Buschjost indicated that the 864 hours submitted by Winrod Brothers Construction prevailed because no other contractor reported more hours paid at a different wage rate with a consistent total fringe benefit.

Counsel for Objector argued that the difference of one cent (\$10.12 and \$10.13) for the total fringe benefit amounts is most likely attributable to a computer rounding tabulation⁴ and, therefore, the hours with a total fringe benefit of \$10.12 should be added to the hours with a total fringe benefit of \$10.13 for purposes of establishing the prevailing wage rate and total fringe benefit for Ozark County.

In Objector's brief, Objector reiterates its argument that the Division failed to properly investigate the hours it used to establish the prevailing wage rate and total fringe benefit for the occupational title of Carpenter in the county of Ozark – Section 077. Objector argues that the Division relied upon "double (or triple) hearsay" in establishing said rates. By contrast, Objector argues that it presented certified payroll from Springfield Builders, Inc. with a weekly breakdown of the hours worked in Ozark County.

Objector attached three exhibits to its brief and argues that said exhibits demonstrate that "1,182 hours were worked by two individuals ... at the rate of \$23.33 per hour for wages. Additionally, 27 hours were worked at overtime rates of time and one-half ($\$23.33 \times 1 \frac{1}{2}$). Of the combined total of 1,109 hours (straight time and overtime) 771 had fringe benefit payments of \$10.12 and 338 had fringe benefit payments of \$10.13, a one penny difference." Objector again states that "it would appear that the toggling between the two [total fringe benefit] rates was computer driven rather than an actual change of rate."

III. Findings of Fact and Discussion

Section 290.262(1) RSMo. provides as follows:

Except as otherwise provided in section 290.260, the department shall annually investigate and determine the prevailing hourly rate of wages in each locality for each separate occupational title. A final determination applicable to every locality to be contained in an annual wage order shall be made annually on or before July first of each year and shall remain in effect until superseded by a new annual wage order or as otherwise provided in this section. In determining prevailing rates, the department shall ascertain and consider the applicable wage rates established by collective bargaining agreements, if any, and the rates that are paid generally within the locality, and shall, by March tenth of each year, make an initial determination for each occupational title within the locality.

The Division established the prevailing wage rate, total fringe benefit, and overtime schedule for Carpenters in the county of Ozark – Section 077 based upon 864 hours of carpentry work reported by Winrod Brothers Construction.

⁴ Objector did not offer any evidence or witnesses to establish that this was in fact the reason for the differing amounts.

Objector challenges the Division's findings based upon hours reported by Springfield Builders, Inc., which Objector believes properly establish a prevailing wage rate of \$23.33 and a total fringe benefit of either \$10.12 or \$10.13.

Within Objector's Exhibits 1 and 2 and Objector's brief, Objector offered three distinct sets of hours and wages. While it is unclear which set of hours Objector wishes the Commission to use in ruling on this objection, it is clear that none of the varying sets of hours submitted show or prove that Springfield Builders, Inc. paid its carpenters at a consistent wage rate with a consistent total fringe benefit for more than 864 hours.

Objector argues, without any legal support, that the Commission should overlook the inconsistency in the total fringe benefit amounts for the hours reported by Springfield Builders, Inc. and combine the hours paid at the wage rate of \$23.33 and a total fringe benefit of \$10.12 with the hours of work paid at the wage rate of \$23.33 and a total fringe benefit of \$10.13. Objector's primary argument for the Commission to combine the hours is that the difference in total fringe benefit amounts is too minuscule to matter. Objector also argues that the inconsistency in the total fringe benefit amounts is "most likely" due to a computer rounding tabulation.

Objector did not offer any evidence whatsoever to establish or prove that the inconsistency in the total fringe benefit amounts was, in fact, due to a computer rounding tabulation. However, even if Objector did prove that the differing amounts were computer driven, this proof would mean nothing for purposes of this objection if the differing total fringe benefit amounts were actually paid by Springfield Builders, Inc. for the reported hours. This is because the prevailing wage rates and total fringe benefit amounts are established based upon what was *actually paid* to the workers, regardless of the intent of the contractor or the computer software it uses for its payroll. See *Branson R-IV School District v. Labor and Industrial Relations Commission*, 888 S.W.2d 717, 724 (Mo. App. 1994).

While the difference of one cent in the total fringe benefit amounts seems minuscule, there is no authority for the Division (or the Commission) to overlook small differences in establishing the prevailing wage rates. The Division simply reviews the hours reported by contractors as a total package and determines the prevailing wage rates for each occupational title in each county using the mode method of statistical analysis. *Central Missouri Plumbing Co. v. Plumbers Local Union 35*, 908 S.W.2d 366, 371 (Mo. App. 1995). Objector failed to prove that the hours reported by Springfield Builders, Inc. prevailed over those reported by Winrod Brothers Construction.

In addition to the aforementioned, Objector argues that the Division insufficiently investigated the truth or falsity of the hours reported by Winrod Brothers Construction and, thus, the hours cannot be utilized to indicate work performed in Ozark County. We point out that, although Objector was possessed with the tools of discovery through this objection process, Objector provided no evidence tending to prove the truth or falsity of the hours reported by Winrod Brothers Construction. In any event, Objector provides no legal authority for disregarding the hours submitted by Winrod Brothers Construction and our research reveals none.

The Prevailing Wage Act (§§ 290.210-.340 RSMo.) does not provide any guidance as to the extent to which the Division must investigate the truth or falsity of the hours reported by contractors. Section 290.262(1) RSMo. simply states that "the department shall annually

investigate and determine the prevailing hourly rate of wages in each locality for each separate occupational title." Without more, we find that the Division's review of the hours submitted for carpentry work in Ozark County met the statutory requirement to "investigate" and Objector's argument fails.

IV. Decision

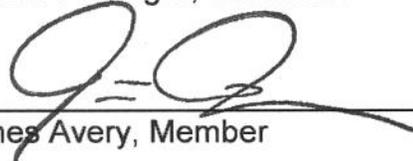
Objector has failed to meet its burden of proof to show that the prevailing wage rate and total fringe benefit contained in Annual Wage Order No. 19 for the occupational title of Carpenter in the county of Ozark – Section 077 should be amended to reflect the wage rate and total fringe benefit amounts reported by Springfield Builders, Inc. Objector's objection is overruled.

Given at the City of Jefferson, State of Missouri, this 14th day of June 2012.

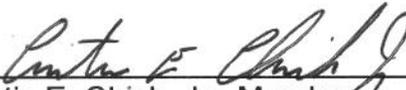
LABOR AND INDUSTRIAL RELATIONS COMMISSION



William F. Ringer, Chairman



James Avery, Member



Curtis E. Chick, Jr., Member

Attest:


Pamela M. Hofmann
Secretary